HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 445/04 (M/S)

M/s Ramjilal Keshav Dutt and others.

Vs

Smt. Devki Devi and others.

Approved for reporting

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~~Not Approved for Reporting~~

Date of decision 20.8.2004.

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

CIVIL PETITION NO. 445 OF 2004 (M/S)

M/s Ramjilal Keshav Dutt

And others. ...Petitioners

Versus

Smt. Devki Devi and

Another. ...Respondents

Counsel for the Petitioner : Mr.Sarvesh Agrawal
Counsel for the Respondent No. 1 : J.C.Belwal

Dated: 20 August 2004

Hon'ble Rajesh Tandon J.

Heard the counsel for the parties.

By the present writ petition the petitioner has prayed for quashing the order dated 28.10.2002 passed by the Prescribed Authority as well as order-dated 7.5.2004 passed in Rent Control Appeal no.8 of 2002.

Briefly stated an application was filed under section 21(1)(a) U.P. Act No.13 of 1972 stating therein that the petitioner are the tenants at the rate of Rs.500/- per month of a shop situate at Moh. Lohara, Kesara Line, Ramnagar.

Respondent No.1 in his application has stated that she has two daughters one Vinita Joshi who is married and Km. Kamla she is prosecuted having her studies.

The Respondent No.1 has submitted that Km. Kamla Sati wants to do the business of Lady readymade Garment and there in no place to accommodate her. Further the Petitioners have

locked the shop and is doing the business of hotel "*Carbet jungle resort*" near Almora apart from that there is a restaurant and bar at Moh Ranikhet, Ramnagar.

The petitioners therefore absolutely have no requirement and the shop has been unnecessarily locked by the petitioners. Written statement was filed by the petitioners and the petitioners in paragraph 24 has admitted regarding running of the hotel business.

''यह है कि प्रार्थिपनी ने विपक्षीगण के जिस कारोबार का जिक्र अपने प्रार्थनाप़त्र में वर्णित किया है उन कारोबार में होटल कार्बट जिला अल्मोड़ा में है और उक्त होटल लि0 कम्पनी के रूप में है ! जिसमें विपक्षी मात्ऱ शेयर होल्डर है, इसके अतिरिक्त बार एंट रेस्टोरेंट का काम विपक्षी अतुल शर्मा के नाम से अतुल शर्मा किराये की जगह पर लेकर रेस्टोरेंट चलाते है इसके अतिरिक्त उक्त श्री अतुल शर्मा विपक्षी ओली जिला चमोली में जो होटल बन रहा है, वह अभी कम्पनी के रूप में है और उसमें मात्ऱ शेयर होल्डर है, उक्त होटल में अभी पूर्ण रूप से बना है और न ही शुरू हुआ है ! विपक्षीगण का आरा मशीन का कारोबार अब बिल्कुल बन्द होने को है क्योंकि लकड़ी के कटान के अभाव में पिछले वर्षों से उक्त व्यापार में विपक्षीगण का खासा नुकसान हो रहा है !

The Prescribed Authority after considering requirement of the landlord has released the premises in favour of the Respondent No.1. Aggrieved by the aforesaid order, the petitioners have preferred an appeal before the Distt. Judge. The District Judge has dismissed the appeal. Hence the present Writ Petition has been filed.

Prescribed Authority has considered the affidavits filed on behalf of both the parties. On behalf of the Respondent No.1

the affidavit of Devki Devi, Affidavit of Km. Kumud Sati. Rejoinder affidavit of Devki Devi paper no. 28 (ga) were filed. All have been taken into consideration by the Prescribed Authority.

On behalf of the petitioners affidavit of Anil Kumar Sharma, Arun Sharma have been taken into consideration.

Prescribed Authority has recorded a finding that there has been no denial on the part of the tenant that he is running a hotel business whereas Respondent No.1 requires the premises for opening the ladies readymade garments and as such the requirements the landlord was held to be bona fide.

So far as the comparative hardship is concerned, the same lies in favour of the Respondent No.1 the Petitioners are the Respondent No.1 wants to get her daughter engaged in the business where as the petitioners have got numerous business and has not even searched any other accommodation during the pendency of the present proceedings.

The appellate authority has also considered the need of the Respondent No.1 for establishing her daughter in the business of ladies garment whereas the petitioners are having various hotel business as will appear from the findings of the appellate court. The finding are quoted below:

''इसलिए विवादित दुकान के निमुक्ति अस्वाभाविक व असदभवी है क्योंकि उसकी पुत्री लेडीस रेडिमेड गारमेंट में कुशल होने का कोई प्रमाणिक आधार नही रखती है ˙

''विपक्षीगण के द्वारा काफी बडा कारोबार एवं व्यवसायरत रहना भी निष्कर्षित है विपक्षीगण द्वारा स्थान ओली जो अन्तरास्ट्रीय ख्याती

प्राप्त स्थान है, में होटल का निमार्ण किये जाने से इन्कार नही किया गया हं ! इसके अतिरिक्त जिला अल्मोडा में ''बार एंड होटल, कार्बेट जंगल रिसोर्ट'' के नाम से व्यवसायरत रहने से भी इन्कार नही है ! यह अन्यथा स्थिती है कि वह इस कारोबार शेयर होल्डर के रूप में रहते हुए कार्य कर रहे है अथवा नही ! न्यायालय इस तथ्य का विवेचन करना आवश्यक नहीं पाता है क्योंकि विपक्षीगण द्वारा भी इस संबंध में अपना अंश या हिस्सा को लेकर कोई प्रपत्र आदि प्रस्तुत नही किये, इसीलिए इतना तथ्य पूस्ट है कि वह होटल एंड रेस्टारेंट आदि का कराबार कर रहे है

''उपरोक्त कारोबार के अतिरिक्त, जैसा की प्रार्थीनी ने रामनगर में ही, रानीखेत रोड पर विपक्षीगण का बार एंड रेस्टारेंट होने का कथन किया है विपक्षीगण को यह रेस्टोरेंट होना स्वीकार किया है परन्तु इसे किराये पर चलाया जाना कहा है ! इसके अतिरिक्ता रामनगर में ही मौहल्ला भवानीगंज में आरामशीन का व्यवसाय कार्य विपक्षीगण करना प्राथीर्नी कह कर आई है और विपक्षीगण को इससे भी इन्कार नही है !

So far as the hardship concurrent

''अपीलार्थीगण/ विपक्षीगण के विद्यान अधिवक्ता द्वारा यह तर्क न्यायालय के समक्ष रखा गया है कि प्रात्यर्थीनी/ वादिनी द्वारा विहित प्राधिकारी / मुख्य न्यायिक मजि0, नैनीताल के न्यायालय में योजित वाद जो आवश्यकता दर्शई गयी है वह उसकी वास्तविक व सदभाविक आवश्यकता नही है बल्कि मनगढन्त तथ्यों के आधार पर केवल अपनी पुत्री के व्यवसाय कराने की इच्छा मात्र जताई है ।यह तर्क भी रखा गया कि वास्तव में प्रत्यर्थिनी / वादिनी के पुत्री के पास न तो ऐसी कोइ शैक्षिक योग्यता है न ही अनुभव है जिससे वह बुटीक का कार्य कर सकें। मनगढन्त आधार पर बिना किसी वास्तविक व सदभज्ञविक आवश्यकता के प्रार्थना पत्र / वाद योजित किया गया ं। जिस व्यवसाय

को अपीलार्थीगण द्वारा किया जाना कहा गया है उसके संबंध में विद्वान अधिवक्ता अपीलाथीगण द्वारा यह तर्क भी रखा गया है कि अपीलार्थीगण का परिवावार बहुत बडा है एवं उनके परिवार का प्रत्येक सदस्य कुछ न कुछ व्यवसाय करता है जबकि प्रत्यर्थिनी / वादिनी द्वारा अपने वाद में समस्त व्यवसाय को दर्शित किया गया है !

So far as the hardship concurrent the appellate authority has recorded a finding to the following effect:

''इसके अतिरिक्त जो न्याय निर्णश्प प्रत्यार्थी द्वारा प्रस्तुत किया है उनके परिशीलन से भी यह स्पस्ट होता है कि प्रत्यर्थिनी/ वादिनी अपनी लडके के व्यवसाय के लिए विवादित दुकान के उनमुक्ति हेतु प्रार्थना पत्र दे सकती है अपीलार्थीगण/ विपक्षीगण इस तथ्य को न्यायालय विहित प्रार्थीकारी / मु0 न्यायिाक मजि0 , नैनीताल के समक्ष सिद्ध करने में असफल रहे कि इस प्रार्थना पत्र को योजित करने के उपरान्त उनके द्वारा कोई प्रयास अपने व्यवसाय को अन्यथा कही करने के संबंध में कोई अन्य दुकान जो किराये पद लेने का प्रयास किया गया हो जबकि प्रत्यर्थिनी/ वादिनी द्वारा स्पस्ट रूप से न्यायालय के समक्ष अभिवर्णित किया गया कि नगर पालिका रामनगर द्वारा कुछ दुकानों बनाकर रामनगर की जनता को उपलब्ध कराई गई अपीलार्थीगण / विपक्षीगण को चहिये था कि वह दुकान लेने का प्रयास करते ।दुकान उसको उपलब्ध होना या न होना एक एसा तथ्य है जो नगर पालिका रामनगर द्वारा दुकानों के आंबटन हेतु बनाई गयी प्रकृति पर निर्भर करता किन्तु अलीलार्थीगण / विपक्षीगण द्वारा विहित प्रार्थीकारी / मुख्य न्यायिक मजि0 नैनीताल के समक्ष कोई ऐसा साक्ष्य नही रखा गया जिससे यह सिद्ध होता हो कि उनके द्वारा कोई प्रयास अपने व्यवसाय को अन्यंत्र ले जाये जाने हेतु किया गया हो ! अतः इन तथ्यों पर जो निष्कार्ष विहित प्राधिकारी/ मुख्य न्यायिक मजि0 नैनीताल द्वारा निकाला गया है वह तथ्यों व साक्ष्य उनके अनुरूप नजर आता है एवं

उसमें कोई भी हस्तक्षेप करने की अवश्यकता महसूस मुझे नही होती है !

''यह दुसरी बात है कि उनके द्वारा कोई ऐसा साक्ष्य नही रखा गया है कि कोई प्रयास उनके द्वारा अन्यत्र दुकान लेने के संबंध में किया गया अतः तुलनात्मक दृष्टि से जो निष्कर्ष विचारणीय न्यायालय द्वारा निकाला गया, उसमें मुझे कोई हस्तक्षे की गुंजाइश नजर नही आता !''

Both the courts below have recorded of concurrent findings of facts regarding the bona fide need and comparative hardship in favour of the landlord. Since both the courts below have recorded the findings that the Respondent No.1 requires the premises for her use and occupation and the tenant has a lucrative business, I find no infirmity in the order passed by both the courts below. So as to interfere under Article 226/227 of the Constitution of India.

Relying upon the Judgment of Surya Devi Rai Vs. Ram Chandra 2003 (6) SCC 675, the Apex Court in Ranjeet Singh Vs. Ravi Prakash 2004 (3) SCC 682, has held as under: -

" As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution of India also, it has been held in Surya Dev Rai that the jurisdiction was not available to be exercised for indulging in reappreciation or evaluation of evidence or correcting the errors in drawing inference like a court of appeal."

In Sushila Vs. IInd A.D.J. Banda and others, 2003 A.I.R. SCW 2002 it has been held that release of the shop on the ground of bona fide need having obtained on technical education shall be given due credit, while considering the factors prescribed under rule 16 sub-rule (2) of U.P.Act No.13 of 1972. The Apex court has observed as under: -

> *"So far as the petitioner is concerned, she has no other shop where she can establish her married son who is unemployed. In such circumstances, the only fact that the shop in question is in possession o the tenant since long will have no material gearing in deciding the question of comparative hardship. To say that son of the petitioner-landlady may remain unemployed but the shop in question must continue to remain in occupancy of the tenant to whom yet another shop is available in Chowk Bazar would not withstand the guildelines and tests laid down in sub-rule (2) of Rule16 of the Rules of 1972".*

> *"A bare perusal of Rule 16 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972, makes it clear that the rule only prescribes certain factors which have also to be taken into account while considering the application for eviction of a tenant on the ground of bona fide need. Sub-rule (2) of Rule 16 quoted earlier relates to the cases of eviction from an accommodation for business use. Clause (a) of sub-*

rule (2) provides, greater the period of tenancy less the jurisdiction for allowing the application; whereas according to clause (bo in case tenant has a suitable accommodation available to him to shift his business, greater the justification to allow the application. Availability of another suitable accommodation to the tenant, water down the weight attached to the longer period of tenancy as a factor to be considered as provided under Clause (a) of sub-rule (2) of Rule 16.Yet another factor which may in some cases be relevant under clause (c) is where the existing business of the landlord is quite huge and 6extensive leaving aside the proposed business to be set up, there would be lesser justification to allow the application. The idea behind sub-clause (c) is apparent i.e. where the landlord runs a huge business eviction may not be restored to for expansion or diversification of the business by uprooting a tenant having a small business for a very long period of time. In such a situation if eviction is ordered it is definitely bound to cause greater hardship to the tenant."

"It may be mentioned that we are not taking into account of clause (d) of sub-rule (2) of Rule 16 of the Rules; where yet another factor is to be borne in mind, in favour of releasing the shop, if the person has some technical education to his credit but not employed in any Government service and wants to engage in self-employment. The petitioner

had shown that her son Prem Prakash had undergone a training course in household electrical wiring and had obtained a certificate from Industrial training Institute, Banda. He did not get any Government job and wanted to be self-employed by starting a shop of electrical goods and utensils. The Prescribed Authority considered this factor but we find that the appellate Court expressed doubt on the fact that the certificate related to Prem Prakash being lead by the fact that his residence was shown as village Lukhtara, undisputedly that village also falls in the district of Banda. It was also observed by the appellate Court that it could not be shown as to what Government job Prem Prakash could get by virtue of the certificate he had obtained from Industrial Training Institute, Banda. The whole approach to the point was misdirected. Be that as it may, we make it clear that even by excluding the factor of Prem Prakash being technically educated. Otherwise as well as find that the need and requirement of the landlady is bona fide even after considering the same in the light of Rule 16 of the Rules and in the background of comparative hardship which we find would be more to the landlady, in the event of disallowing the application for eviction".

Similar view have been taken in the case of G.C.Kapoor Vs. Nand Kumar Bhasin & Ors, 2001 S.C. Full Bench Rent Cases 541 the observations are quoted below:

> *"Clause (a) of Sub-section (1) of Section 21 of the Act inter alia provides that the Prescribed Authority may, on an application of the landlord; order eviction of a tenant form the building under tenancy on the grounds mentioned in the said sub-section. Clause (a) is relevant for our purpose which inter alia provides that an application for eviction can be filed by the landlord if the building is bona fide required by the landlord for occupation by himself or by any member of the family or by any person for whose benefit the premises is held by him, either for residential purposes or for purposes of any profession, trade or calling. Section 41 of the act empowers the State Government to make rules to carry out the purposes of the Act. Exercising powers under the said provision, Government has framed a set of rules viz. the Uttar Pradesh Urban Building (Regulation of letting, Rent & Eviction) Rules 1972j. Rule 16 is the relevant rule for release of a premises on the ground of personal requirement. Sub- rule (2) lays down that while considering an application for release under clause (a) of sub-section (1) of Section 21 in respect of building let out for purposes of any business, the Prescribed Authority shall also have due regard to the facts*

stated in the clause in the sub-rule. We are concerned with clause (d) which runs as follows:-

> *"(d) Where a son or unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant of the landlord has, after the building was originally let out, completed his or her technical education and is not employed in government service, and wants to engage in self-employment, his or her need shall be given due consideration".*

"It is settled position of law that bona fide requirement means that requirement must be honest and not tained with any oblique motive and is not a mere desire or wish. In ***Dattaraya Laxman Kamble Vs Abdul Rasul Moulali Kotkunde and another, 1994(4) SCC 1: 1999 SCFBRC 292,*** *this Court while considering the bona fide need of the landlord was of the view that when a landlord says that he needs the building for his own occupation, he has to prove it but there is no warrant for 'persuming that his need is not bona fide'. It was also held that while deciding this question, Court would look into the board aspects and if the Court feels any doubt about bona fide requirement, it is for the landlord to clear such doubt.*

"In Raghunath G.Panhale (D) by Lrs.Vs. Chaganla Sundarji and Co. 1999(8)SCC 1: 1999 SCFBRC 440, this Court interalia held that it was not necessary for landlord to prove that he had money to invest in the new business contemplated not that he had experience of it. It was a case for eviction on the ground of bona fide requirement of the landlord for non-residential purpose, as he wanted to start a grocery business in the suit premise to improve his livelihood."

In Surya Dev Rai Vs. Ram Chander SCC 2003 Vol-6 675, the Apex Court has held as under:-

"In Surya Dev Rai Vs. Ram Chander Rai that the jurisdiction was not available to be exercised for indulging in reappreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal. The High Court has itself recorded in its judgment that- "considering the evidence on the record carefully" it was inclined not to sustain the judgment of the appellate court. On its own showing the High Court has acted like and appellate court which was not permissible for it to do under Article 226 or Article 227 of the Constitution."

"Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the suboridinate courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction

which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction."

" Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirement are satisfied: (i) The error is manifest and apparent on the fact of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby."

" A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

" The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be

invoked during the pendency of any suit or correction is yet capable of being corrected at the conclusion of the proceedings is an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and or early disposal of the suit of proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that every moment, may become incapable of correction at a letter stage and refused to intervene would result in stravesty of justice or where such refusal itself would result in prolonging of the lis."

"*The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.*"

The findings on bona fide need and comparative hardship being findings of fact, no interference is required under Article 226 of the constitution of India in view of the various Judgments of the Apex court. In Radha Kant Dubey Vs. Vth A. D. J. Kanpur Nagar and others 2001 (1) ARC 642, it has been observed as under:-

"*The respondent No.3 filed a petitioner under Section 21(1)(a) of U.P. Act No. 13 of 1972 which was allowed by the Prescribed Authority by order dt. 2-3-*

1992. Against this order the present petition preferred an Appeal No. 131 of 1992 under Section 22 of the Act which was dismissed on 18-1-2001.

Sh. K.K. Tripathi learned counsel for the petitioner urged that the Prescribed Authority as well as the learned Appellate Court have misread the evidence and have recorded findings which do not flow from the evidence on record. Sh. Rajesh Tandon pointed out that it is well established proposition of law that finding with regard to the bona fide need of the landlord as well as that of the hardship is a finding of fact which cannot be disturbed in writ jurisdiction under Article 226 of the Constitution of India .In support of his submission he placed reliance on some decision in the case of Kamla Sarin Vs. Shyam Lal and others, 1984 (2) ARC 344, in the case of Munni Lal and another Vs. Prescribed Authority and another AIR 1978 SC 29: 1981 ARC 470, in the case of Nathu Lal Vs.Radhey , AIR 1974 SC 1696, in the case of Babhutmal Rai Chand Vs.Laxmibai, AIR 1975 SC 1296, in the case of Smt. Labhkumar Bhagwani Sinha Vs. Janardan Mahedeo Kalan AIR 1983 SC 535, in the case of Ram Rakesh Pal and another VS Ist Additional District Judge and others, 1967 UPRC 376, in the case of Jagan Prasad Vs. District Judge and another , 1976 UpRCC 342, in the case of Laxmi Narain Vs. IInd Additional District Judge and another, 1977 UPRCC 230, in the case of Smt. Nirmala Tandon V. Xth Additional District Judge, Kanpur Nagar 1996 (2) ARC 490, and in

the case of Kamleshwar Prasad VS. Praduman Ju Agarwal, 1997 (1) ARC 627.

From the decisions aforesaid it is well embedded proposition of law that extraordinary jurisdiction of this court under Article 226 of the Constitution of India cannot be invoked for disturbing the concurrent finding of fact with regard to the bona fide need of the landlord as well as that of the hardship. In view of the firm legal position I am not inclined to interfere in the matter. The writ petition is dismissed.

After the above order was passed Sh. K.K.Tripathi learned counsel for the petitioner urged that sometime may be allowed to the petitioner to shift to another accommodation by making alternative arrangement Sh. Rajesh Tandon learned Counsel for the landlord respondent No.3 states that if some reasonable time is allowed to the petitioner the landlord shall have no objection.

With a view to mitigate the hardship of the petitioner which is likely to occasion on account of displacement pursuant to the order of release and with a view to balance the rights of the parties, I feel that it would be proper and in the interest of justice if the order of release which has been affirmed by the Appellate Court is deferred from being implemented till 30th November 2001. The petitioner shall furnish an undertaking on affidavit to be filed before the Prescribed

Authority with is a month from today. After the undertaking is filed, the possession of the petitioner over the disputed accommodation which has been released shall not be disturbed till 30th November 2001. In case the petitioner does not deliver vacant possession of he released accommodation by 30th November 2001, the order of release shall become executable. In the event of failure of the petitioner to furnish undertaking on affidavit within time as specified above, the concession granted to him to continue to occupy the accommodation till 30th November 2001 shall stand withdrawn."

In support of his submission he placed reliance on some decisions:

In the case of Kamla Sarin Vs. Shyam Lal and others, 1984 (2) ARC 344, in the case of Munni Lal and another Vs. Prescribed Authority and another AIR 1978 SC 29: 1981 ARC 470, in the case of Nathu Lal Vs.Radhey , AIR 1974 SC 1696, in the case of Babhutmal Rai Chand Vs.Laxmibai, AIR 1975 SC 1296, in the case of Smt. Labhkumar Bhagwani Sinha Vs. Janardan Mahedeo Kalan AIR 1983 SC 535, in the case of Ram Rakesh Pal and another VS Ist Additional District Judge and others, 1967 UPRC 376, in the case of Jagan Prasad Vs. District Judge and another , 1976 UpRCC 342, in the case of Laxmi Narain Vs. IInd Additional District Judge and another, 1977 UPRCC 230, in the case of Smt. Nirmala Tandon V. Xth Additional District Judge, Kanpur Nagar 1996 (2) ARC 490, and in the case of Kamleshwar Prasad VS. Praduman Ju Agarwal, 1997 (1) ARC 627.

However, time is granted up to January 2005 to vacate the premises provided undertaking is given within a period of one month and further the entire arrears of rent be deposited.

Consequently, the writ petition is dismissed. No order as to costs.

(Rajesh Tandon J.)

August 20, 2004

M.K.